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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951 A. D.

No. 685

THOMAS EDWARD FURLONG, HARRY SCOTT KNEEVERS and CHARLES JOSEPH SWARTZ,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners, Thomas Edward Furlong, Harry Scott Kneevers and Charles Joseph Swartz, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled cause on January 15, 1952 A.D., and the order of said Court denying rehearing in said cause entered on March 4, 1952 A.D.

OPINIONS BELOW.

The District Court entered no opinion. The opinion of the Circuit Court of Appeals (R. 350-356) has not yet been reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on January 15, 1952 A.D. (R. 356). Thereafter a Petition for Rehearing (R. 357-366) was filed with said Court on January 31, 1952 A.D., and an order denying said petition (R. 367) was entered by said Circuit Court of Appeals on March 4, 1952 A.D. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

1. When a jury reports itself deadlocked after only three and one-half hours deliberation in a case involving four defendants, six distinct offenses, and seven days of trial, does a supplemental instruction that the minority of the jury should reconsider their decision, since the majority has arrived at a contrary conclusion, unduly coerce and influence the jury?

2. Where the trial judge did not give counsel an opportunity to object to a supplemental instruction before the jury left the box, and indicated, in deciding the motion for new trial, that he believed that counsel had been given adequate opportunity to object to the instruction before it was given, does the absence of a specific objection to a portion of the instruction bar review of its correctness, under Rule 30 of the Rules of Criminal Procedure?

3. In the absence of a specific objection, is a Court of Appeals without discretion, under Rule 30 of the Rules of Criminal Procedure, to consider the coercive effect of an instruction urging the minority of the jurors to reconsider, and directing the jury to continue their deliberations until they arrive at a unanimous verdict?

4. Does an instruction, urging the minority of the jury to reconsider their decision, since the majority has arrived at a contrary conclusion, and directing the jury to continue their deliberations until they arrive at a unanimous verdict, coerce the individual jurors into surrendering their honest convictions?

RULES INVOLVED.

Rule 30 and Rule 52(b) of the Federal Rules of Criminal Procedure are reprinted in Appendix A, *infra*, p. 1a.

STATEMENT.

This action was brought on an indictment returned by the January 1951 Grand Jury for the Northern District of Illinois charging petitioners, or some of them, together with one Daniel Anthony Burns, with five distinct violations of Title 18, U.S.C., Section 912, obtaining money by impersonating Federal Officers and with violation of Title 18, U.S.C., Section 371, conspiracy to violate Section 912 of said Title (R. 3-5). The matter was tried before the Honorable William J. Campbell in the United States District Court for the Northern District of Illinois, sitting with a jury, on May 8, 1951 through May 11, 1951 and May 14th and 15th, 1951 (R. 6-293).

On May 16, 1952 Judge Campbell instructed the jury, who retired to the jury room at 11:10 A.M. After the jury had retired, there ensued a colloquy between the judge and counsel concerning dismissing the jury and the giving of supplemental instructions, which resulted in the judge instructing counsel to return to the court room at three o'clock in the afternoon to confer on the possibility of giving the *Allen* instruction, if the jury had not returned prior to that time. Judge Campbell then explained that he had reserved his ruling on the motion for

a judgment of acquittal on behalf of the defendant, Daniel Anthony Burns, until after the jury had retired in order to avoid unduly influencing them. He then granted the motion with respect to said defendant (R. 293-295).

At three o'clock of the same day when all counsel appeared in Judge Campbell's chambers, they were informed that the foreman of the jury had requested that the Judge be told that the jury was "hopelessly deadlocked." After commenting that the jury could not have gone over all of the evidence in the case, the Judge announced his intention to give the charge in the *Allen* case to which Mr. McAdams, on behalf of the defendants, objected. After discussion of the questioning of the jury and the entry of an order providing for a sealed verdict in case the jury returned after 4:00 P.M., (R. 295-298) the Judge resumed the bench and, the jury being summoned, gave the supplemental charge approved in *Allen* v. *United States,* 164 U. S. 492, 501 (1896), (R. 298-300) concluding with the words, not appearing in the charge approved in the *Allen* case:

> "With that admonition you are directed to continue with your deliberations until you arrive at a unanimous verdict. You will again retire to your jury room and continue your deliberations."

Immediately thereafter the jury retired and the Court declared a recess (R. 300).

On May 17, 1951 the verdict of the jury, which had been returned sealed at 7:40 P.M. on May 16th, was read in open Court, finding Petitioner Furlong guilty on counts 1, 2 and 6 of the indictment and not guilty on counts 3, 4 and 5; Petitioner Kneevers guilty on counts 1, 2 and 6 and not guilty on counts 3 and 4, and Petitioner Swartz guilty on counts 1, 2 and 6 and not guilty on count 3 (R. 301).

On May 22, 1951 counsel filed a motion for a new trial on behalf of petitioners, points 18, 19 and 20 of which (R. 307-308) challenged the propriety of giving the supplemental instruction, the propriety of the closing phrases of that instruction, and the propriety of allowing the jury to retire before giving counsel for the petitioners an opportunity to object after the charge was given. All pending motions, including the motion for new trial, were heard and denied on June 1, 1951 (R. 340), the Judge commenting with respect to the giving of the *Allen* charge that an adequate opportunity for objection had been given (R. 337). Judgment was then entered on the verdict and each of the defendants sentenced to three years in the custody of the Attorney General (R. 341).

On appeal, the Court of Appeals for the Seventh Circuit held that it was without power, under Rule 30 of the Rules of Criminal Procedure, to consider the allegation that the phrase directing the jury to deliberate until it arrived at a unanimous verdict coerced the individual jurors since a specific objection had not been made before the jury retired after the giving of this instruction, and that the giving of the supplemental instruction was not an buse of discretion (R. 351-353). Since the issue concerning the effect of Rule 30 had not been raised prior to the filing of the opinion, a Petition for Rehearing was filed, contending that Rule 30 was not applicable because of the fact that the trial judge directed the jury to retire without giving counsel an opportunity to object to the instruction as given, and that the Court of Appeals could, in its discretion, consider the question regarding the effect of the instruction without specific objection (R. 357-366). This petition was denied, without further opinion, on March 4, 1952 (R. 367).

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In holding that the lack of a specific objection to the phrase in the supplemental instruction, directing the jury to continue their deliberations until they reached a unanimous verdict, precluded review of the question of whether that phrase unduly coerced the individual jurors into surrendering their honest opinions.

2. In holding that it has no discretion to consider the objection to the supplemental instruction above-mentioned in the absence of a specific objection.

3. In failing to exercise its discretion under Rule 30 and Rule 52(b) of the Rules of Criminal Procedure to consider the supplemental instruction in the absence of a specific objection thereto.

4. In holding that the votes of the jurors indicated a lack of coercion.

5. In failing to hold that the addition of the phrase directing the jury to continue its deliberations until it arrived at a unanimous verdict unduly coerced the individual jurors into surrendering their honest opinions.

6. In failing to hold that the giving of the supplemental instruction, under all of the facts and circumstances of the case, constituted an abuse of discretion.

7. In holding that the giving of the supplemental instruction after three and one half hours of deliberation was not an abuse of discretion.

8. In failing to hold that the failure of the Trial Judge to afford counsel for petitioners an opportunity to object to the supplemental instruction before the jury left the

box was error under Rule 30 of the Federal Rules of Criminal Procedure.

9. In affirming the judgments of the District Court.

REASONS FOR GRANTING THE WRIT.

1. In holding that the Trial Court did not abuse its discretion, the Court of Appeals added to the confusion concerning the limits of discretion in connection with the giving of the supplemental instruction approved in *Allen* v. *United States,* 164 U.S. 492, 501, and misapplied the decision of this Court in *Allis* v. *United States,* 155 U.S. 117; this instruction is so crucial in criminal cases that the circumstances under which it may be given are a question of great importance in the fair and impartial administration of justice, requiring clarification by this Court.

(a) There is considerable confusion as to the proper factors for consideration in determining whether the giving of the *Allen* instruction constitutes an abuse of discretion, all of which factors were not considered by the Court of Appeals in this case. The custom of giving an instruction urging the minority of the jury to reconsider in view of the fact that a majority have arrived at an opposite conclusion in cases where the jury is deadlocked received its sanction and impetus from the case of *Allen* v. *United States,* 164 U.S. 492, 501, decided by this Court in 1896. That case, however, was reviewed in this Court upon a very meager record, consisting only of the instructions given and assignments of error predicated thereon, and without brief on the part of the appellant. The only issues presented were whether or not certain instructions, including the one herein referred to, correctly stated the law. In only two subsequent cases has the instruction been before this Court on the merits, and both of those cases, *Burton* v. *United States,* 196 U.S.

283 and *Brasfield* v. *United States,* 272 U.S. 448, were concerned with the question of whether or not an inquiry by the Trial Judge as to how the jury was divided before giving the instruction constituted error.

Meanwhile the Courts of Appeals have, piecemeal, through some fifty cases involving this instruction built up a number of tests by which the propriety of this instruction may be determined. In *United States* v. *Samuel Dunkel & Co.,* 173 F. (2d) 506, 508 (C.C.A. 2, 1949), the Second Circuit indicated that the proper test was the examination of all of the facts and circumstances surrounding the giving of the charge. Some Courts appear to require that, along with the so-called *Allen* instruction, additional charges be given as to the presumption of innocence, the burden of proof, and the requirement that guilt be proved beyond a reasonable doubt (*Berger* v. *United States,* 62 F. (2d) 438, 440 (C.C.A. 10th, 1932), approving the giving of a supplemental instruction in a case where the original instructions on those points were re-read in connection with the *Allen* instruction (*Culp* v. *United States,* 131 F. (2d) 93, 101 (C.C.A. 8th, 1942). Other Courts, in determining the possible effect of a supplemental instruction, have looked to the nature of the verdict returned, and interpreted verdicts of not guilty as to some defendants and some counts together with verdicts of guilty as to others after the giving of a supplemental instruction, as raising an inference of compromise and therefore coercion (*Peterson* v. *United States,* 213 Fed. 920 (C.C.A. 9th, 1914) and *Edwards* v. *United States,* 7 F. (2d) 598 (C.C.A. 8th, 1925). This is in direct conflict with the significance attached to such a verdict by the Court of Appeals here (R. 352-353). Under these circumstances, the necessity for a comprehensive determination by this Court of the

factors to be considered in giving this type of supplemental instruction is clear.

(b) The Court of Appeals misapplied the decision of this Court in *Allis* v. *United States,* 155 U. S. 117, 123. Almost all of the cases consider the time which the jury has deliberated as being significant, such a consideration stemming from the decision of this Court in *Allis* v. *United States, supra.* Examination of the opinion of the Court of Appeals here (R. 353) indicates that a deliberation of more than three hours was considered sufficient. In the *Allis* case, this Court stated that there was nothing in the record to show that the Court abused its discretion or failed to wait a reasonable time for the jury to deliberate; here, however, the Trial Judge, in chambers, expressed his opinion that the jury could not possibly have gone over all of the evidence in the case (R. 295). It seems clear from the comments of this Court in *Allen* v. *United States,* 164 U.S. 492, 501 that the *Allen* instruction contemplates that the minority shall reconsider their own views in the light of the intelligent and informed opinion of their fellow jurors. Until the jury has an opportunity to review all of the evidence thoroughly and to hear and consider each other's arguments on all of the issues in the case, the giving of the *Allen* instruction will not accomplish its object. Thus, when the record discloses that the Trial Judge believed that such was not the case, the doctrine of the *Allis* case alone would require an opposite result.

(c) This instruction is so crucial in criminal cases that the circumstances under which it may be given are a question of great importance in the administration of justice and should be decided by this Court. Anglo-Saxon criminal jurisprudence has been founded, historically, on the presumption of innocence and the re-

quirement that the guilt of the accused be proven beyond a reasonable doubt. The increasing efficiency of the law-enforcing agencies of the Federal Government, together with the wide-spread popular belief in their infallibility, sponsored by fiction, radio, television and the press, has resulted in a lessening of the effect of these presumptions, particularly in the minds of jurors (*Cf.* 4 Barron, *Federal Practice & Procedure* p. 441). Under these circumstances, the effect of the *Allen* instruction, logically, is to reinforce the convictions of the majority of the jurors, who are apt to be predisposed to believe that the defendant must be guilty, otherwise the Federal government would never have brought the proceedings. This Court, under its power to regulate the procedure in the Federal courts, has intervened in the interests of insuring criminal defendants a fair trial, *McNabb* v. *United States,* 318 U.S. 332, 340. In the light of the practical diminution in the effect of the presumption of innocence since the decision in *Allen* v. *United States,* 164 U.S. 492, in 1896 and the recognition by this Court in *Burton* v. *United States,* 196 U.S. 283, 307 that "a slight thing may have determined the balance against the accused" with respect to the giving of supplemental instructions, the circumstances under which the *Allen* instruction may properly be given should be reviewed and limited by this Court in the interests of justice.

2. The construction placed on Rule 30 of the Rules of Criminal Procedure by the Court of Appeals presents an important question concerning the construction of this rule which should be determined by this Court and sanctions a departure from the usual course of judicial procedure in Federal Criminal Cases.

(a) The holding that Rule 30 prevented consideration of the substantive error alleged in the supplemental instruction, under the circumstances of this case, raises a

question as to the meaning of the phrase "Opportunity shall be given to make the objection out of the hearing of the jury." The Rule requires that objections be made specifically before the jury retires to consider its verdict. Since the language requiring that opportunity be given to make objections out of the presence of the jury is mandatory, the Rule apparently requires that the Trial Judge take the initiative by asking counsel if he desires to be heard out of the presence of the jury. This construction is supported by the reasoning of the only case to comment on the significance of this sentence, *Lovely* v. *United States,* 169 F. (2d) 386, 391 (C.C.A. 4th, 1948). There the Court noted that failure to observe the requirement that objections be made out of the presence of the jury would be sufficient grounds for granting a new trial since counsel should not be required to place themselves in an attitude of apparent antagonism to the Court such as is involved in excepting to instructions. Particularly, where the objection is to a critical supplemental instruction, even a request by counsel to be heard outside of the presence of the jury before it retires, after the Trial Judge has already directed them to retire has the effect condemned in the *Lovely* case.

Counsel therefore contended, in the Petition for Rehearing, that the failure of the Trial Court to follow this construction of the rule negated the requirement that specific objections be made to the instruction before the jury retires, particularly where, on motion for new trial, the Trial Judge indicated that he assumed the opportunity afforded counsel to object before the charge was given was sufficient, (R. 360-362). This contention was not accepted by the Court of Appeals.

No citations are necessary as to the number of cases in which the lack of a specific objection furnishes the

grounds for the rejection of a contention made by appellants; in the interests of the orderly administration of justice, therefore, it is necessary that this Court prescribe the procedure to be followed by the lower Federal Courts in administering this Rule and entertaining objections to instructions under it.

(b) The construction placed on Rule 30 by the Court of Appeals sanctions a variance from the usual judicial custom in Federal Courts with respect to the entertaining of instructions. In this case, the Trial Judge directed the jury to retire immediately after giving the instruction and without any remarks to counsel prior thereto (R. 300). It is sufficient to note here that the usual practice is to give the instruction, inquire of counsel if they wish to be heard outside of the presence of the jury, and, in the event of a negative answer, to then excuse the jury. In view of the burden placed upon counsel by the provision that objections shall be made before the jury retires, this procedure, which has the effect of making the record show the equivalent of an affirmative approval of the instructions, seems reasonable, and, for the reasons previously mentioned, any deviation from it is of sufficient importance to be considered and passed upon by this Court in the interests of securing a uniform practice among all of the Federal Courts.

3. The decision of the Court of Appeals that it was without power to pass on the merits of the substantive error alleged in the supplemental instruction conflicts with the decisions of this Court, the decisions of other circuits, and other decisions by another panel of judges of the same circuit. The opinion of the Court of Appeals (R. 352) clearly indicates that the court felt it was without power to consider the substantive objection that the addition of the phrase directing the jury to continue its

deliberations until it arrived at a unanimous verdict to the *Allen* instruction coerced the individual jurors because of the lack of a specific objection. Further examination of the cases cited by that Court indicate that it based its decision on Rule 51 of the Rules of Civil Procedure since they are all civil cases. Although the text of the two rules is identical, the following cases all hold that, both because of Rule 52(b) and independently of it, the Court, under Rule 30 of the Federal Rules of Criminal Procedure, has discretion to consider substantial errors affecting the rights of the defendants because their liberty is involved: *Madsen* v. *United States,* 165 F. (2d) 507 (C.C.A. 10th, 1947); *United States* v. *Rappy,* 157 F. (2d) 964 (C.C.A. 2d, 1946); *United States* v. *Levi,* 177 F. (2d) 827, 831 (C.C.A. 7th, 1949); *United States* v. *Raub,* 177 F. (2d) 312, 316 (C.C.A. 7th, 1949). This contention was presented to the Court of Appeals on Petition for Rehearing (R. 362-365) and its failure to modify its opinion clearly indicates that its decision was based, not upon a refusal to exercise discretion, but upon a conviction that it did not have discretion to consider this objection.

Moreover, this holding conflicts with the holding of this Court in *Brasfield* v. *United States,* 272 U. S. 488 that a failure to particularize exceptions does not preclude the correction of errors, especially where the error affects the proper relations between Court and jury and cannot be remedied by modification of the charge after the harm has been done.

4. The question as to whether or not the addition of the phrase directing the jury to continue its deliberations until it arrived at a unanimous verdict to the *Allen* instruction coerced the individual jurors into surrendering their honest convictions regarding the case is of sufficient importance to the administration of justice to warrant

review by this Court. As previously indicated, the last time this Court was called upon to pass upon the validity of a supplemental instruction was in *Allen* v. *United States,* 164 U.S. 492, 501, decided in 1896. Since that time the principle of a supplementary instruction has found acceptance in approximately fifty cases with but little attention given to determination of the propriety of the individual variants given. The major case containing such a test is *Stewart* v. *United States,* 300 Fed. 769, 785-787 (C.C.A. 10th, 1924) where Judge Sandborn reversed the Trial Court on the grounds that the charge there given so slightingly treated the duty of the individual juror to form and make the verdict express his own view that it was coercive. Some doubt has arisen concerning this case because of the language to the effect that a jury which would be unable to maintain its individual and collective independence against such a charge "would be no better than a sounding board for a judicial whisper," *United States* v. *Olweiss,* 138 F. (2d) 798, 801 (C.C.A. 2d). As has been pointed out, the charge, together with the status of the Federal law-enforcing agencies in the minds of the jurors, inherently prejudices the right of defendants in criminal cases to the full benefit of the presumption of innocence. Add to this the effect of language which threatens to hold the jurors together in a close situation of great conflict of both emotion and opinion until they agree, and an inherently coercive situation develops. In view of the possible conflict in the true test of the validity of such an instruction together with its obvious importance to the rights of criminal defendants, this Court ought to exercise its jurisdiction over the practice in inferior Federal Courts, *McNabb* v. *United States,* 318 U.S. 332, 340, to determine whether or not the charge approved in *Allen* v. *United States,* 164 U.S.

492, 501 (1896) represents the extreme limits to which a Trial Judge may go in such circumstances, if not, in fact, the propriety of over-ruling the *Allen* case on this point.

CONCLUSION.

For the above and foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANK J. MCADAMS, JR.,
Counsel for Petitioners.

March 26, 1952 A.D.

APPENDIX A.

Federal Rules of Criminal Procedure.

Rule 30. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 52(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 685

THOMAS EDWARD FURLONG, HARRY SCOTT KNEEVERS and CHARLES JOSEPH SWARTZ,
Petitioners

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 350-356) is reported at 194 F. 2d 1.

JURISDICTION

The judgment of the Court of Appeals was entered on January 15, 1952 (R. 356) and a petition for rehearing (R. 357-366) was denied on March

4, 1952. The petition for a writ of certiorari was filed April 2, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTION PRESENTED

Whether a supplemental charge to a deadlocked jury was rendered coercive by a sentence, to which no objection was raised at the time, directing the jury to continue its deliberations until it reached a unanimous verdict.

RULE INVOLVED

Rule 30, Federal Rules of Criminal Procedure:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall

be given to make the objection out of the hearing of the jury.

STATEMENT

Petitioners, together with one Burns, were indicted in the United States District Court for the Northern District of Illinois on six counts charging them with obtaining money by impersonating federal officers on five separate occasions, in violation of 18 U.S.C. 912, and with conspiracy to violate that section (R. 2, 3-6). The jury found petitioners guilty on counts one and two, and count six, the conspiracy count. It acquitted petitioners on other substantive counts in which they were named, and returned a verdict of acquittal as to Burns (R. 301).[1] Petitioners were each sentenced generally to three years' imprisonment. The judgments were affirmed on appeal (R. 356).

As to petitioners, the Government adduced the following evidence bearing on their convictions on counts one and two:

On the evening of November 15, 1950, petitioners entered a tavern or roadhouse in Joliet, Illinois (R. 7-8, 14-15, 32, 36-37), stated they were from the F.B.I., and asked those present to produce identification (R. 7, 32-33, 38). They then sought out Carey Moore, the proprietor of the establishment (R. 8-9, 15, 32, 38). Petitioner Furlong, on

[1] After the jury had retired, but before the verdict was returned, the judge had granted a motion for acquittal as to Burns under Rule 29(b).

approaching Moore, said he was from the F.B.I., flashed a badge, and asked Moore whether he was running a house of prostitution (R. 16). When Moore replied in the affirmative, Furlong made further inquiries as to the number of girls employed and where they came from (R. 16-17). When Moore asked whether something could be done about his difficulties, Furlong, after some hesitation, replied, "Well maybe you can; we will see" (R. 18). Then, after consulting with the other petitioners, Furlong told Moore, in effect, that he would be all right if he paid $1,000 (R. 18). Moore was unable to pay that amount, but he did pay $900, after which Furlong assured him he "wouldn't be bothered any more" (R. 19-20). Petitioners then left the premises.

On the night of November 20, 1950, petitioners entered a house of prostitution in Wilmington, Illinois, run by a Julius Shlensky (R. 41-42, 49-50, 53-54, 57, 72). Petitioners again represented that they were from the F.B.I. (R. 42-43, 55), and indicated they were making a raid. When Shlensky asked if he could "straighten this out" (R. 43), Furlong replied, "How about $500?" Shlensky had only $135, which he paid to Furlong (R. 43). Petitioners then left the premises, taking along two of the girls to "make it look * * * official" (R. 43).

Petitioners did not deny that they had been in the two places named by witnesses for the Govern-

ment, nor that they had interrogated the proprietors about the nature of their businesses and their source of girls (R. 124, 195, etc.). They contended, however, that these visits were part of an investigation of prostitution which they were conducting for the Kefauver Committee (R. 100, 178-179, etc.); that they had not represented that they were agents of the F.B.I. (R. 181, 195); and that they never took any money (R. 117, 203).

At 11:10 on the morning of May 16, 1951, the jury retired to consider the evidence (R. 293). A recess was then taken until the return of the jury or until 3:00 o'clock (R. 295). When counsel and the judge met in chambers at 3:00 o'clock, the judge told counsel that he had been notified through the marshal that the jury was "hopelessly deadlocked and that there was no chance of an agreement regardless of how long they deliberated" (R. 295). The judge then announced his intention of giving "the charge in the Allen case" (R. 295) (*Allen* v. *United States,* 164 U.S. 492). During the colloquy which followed, it was suggested that the judge inquire whether the deadlock was as to any one individual, since presumably there was such a possibility as to Burns, but the judge stated he thought that might tend unduly to influence the jury and that he would not ask any questions of the jury as to their vote (R. 296-297). Counsel for petitioners objected generally to the giving of the *Allen* charge (R. 297).

The charge was delivered, as follows (R. 298-300):

> The manner provided by our Constitution and laws for deciding questions of fact in cases such as this is by a verdict of a jury. In a large proportion of cases, and perhaps, strictly speaking, in all cases, absolute certainty cannot be attained or expected. Although the verdict to which a juror agrees must, of course, be his own verdict—the result of his own convictions and not a mere acquiescence in the conclusion of his fellows, yet, in order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor, and with a proper regard and deference to the opinions of each other. You should consider that the case must at some time be decided; that you are selected in the same manner, and from the same source, from which any future jury must come; and there is no reason to suppose that the case will ever be submitted to twelve persons, twelve men and women more intelligent, more impartial, or more competent to decide it, nor that more or clearer evidence will be produced on one side or the other. With this in view, it is your duty to decide the case if you can conscientiously do so. In order to make a decision more practicable, the law imposes the burden of proof on one part[y] or the other,

in all cases. In the present case, the burden of proof—the burden is upon the Government to establish the guilt of the defendants beyond a reasonable doubt, and if you are left in doubt as to the guilt of the defendants, or any one of them, such defendant or defendants is entitled to the benefit of that doubt and must be acquitted. But, in conferring together you ought to pay proper respect to each other's opinions and reasons, with the disposition to be convinced with each other's arguments. And, on the one hand, if much the larger number of you are for a conviction the dissenting jurors should consider whether the doubt in their own minds is a reasonable one which makes no impression upon the minds of so many men and women equally honest, and equally intelligent, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath. And, on the other hand, if the majority of you are for acquittal, the minority should equally ask themselves whether they may not reasonably and ought to doubt the correctness of the judgment which is not concurred in by a number of those with whom they are associated and distrust the weight or sufficiency of that evidence which fails to carry conviction in the minds of their fellows.

> With that admonition you are directed to continue your deliberations until you arrive at a unanimous verdict. You will again retire to your jury room and continue your deliberations.

No objection was made to any part of the charge as given and the jury then retired. At 7:40 that evening, a verdict was reached (R. 301).

ARGUMENT

1. Petitioners, although admitting that the *Allen* instruction has found general acceptance, argue that the instruction in this case was rendered coercive by the sentence toward the conclusion, reading, "With that admonition you are directed to continue your deliberations until you arrive at a unanimous verdict" (R. 299-300). Standing alone, and read literally, that sentence might conceivably be construed as a command to dissenting jurors to abandon their position and side with the majority. However, in determining whether a charge is erroneous or prejudicial it is not enough to consider an isolated phrase; the charge must be viewed as a whole and the complained of portion put in its proper setting. See *United States* v. *Kaadt,* 171 F. 2d 600 (C.A. 7); *Moffitt* v. *United States,* 154 F. 2d 402 (C.A. 10), certiorari denied, 328 U.S. 853; *Eastman* v. *United States,* 153 F. 2d 80 (C.A. 8), certiorari denied, 328 U.S. 852.

A reading of the full charge in this case reveals that it was eminently fair to petitioners. At the outset the judge instructed that the verdict to which a juror agrees must not be "a mere acquiescence in the conclusion of his fellows," and that the jurors had a duty to reach a verdict if they could "conscientiously do so." The necessity of the Government's establishing the guilt of defendants "beyond a reasonable doubt" was reiterated with great care. And the sentence immediately preceding that now complained of admonished the jurors that if only a minority favored conviction they ought to reconsider in the light of the majority's decision to acquit.

As petitioners indicate (Pet. 14), there is no invariable formula, compliance with which validates an *Allen*-type charge. Thus, a supplemental charge in which the judge urged dissenting jurors not to be "bull-headed" or "stubborn" was upheld because the "context prevented it from being coercive." *Bord* v. *United States,* 133 F. 2d 313, 315 (C.A.D.C.), certiorari denied, 317 U.S. 671. In *United States* v. *Olweiss,* 138 F. 2d 798, 800, 801 (C.A. 2), certiorari denied, 321 U. S. 744, the trial judge had told a divided jury: "It is a simple question. You should not have the slightest difficulty in coming to an agreement on this. I am sure you cannot act like a boy and go in a corner and say, 'I have made up my mind and that is the end of it.' " To the contention that this language,

which goes considerably beyond that complained of here, was coercive, Judge Learned Hand answered: "A jury which felt itself coerced by such language would have lacked all independence of mind; would have been no better than a sounding board for any judicial whisper."

That this sentence did not seem coercive at the time it was given is demonstrated by the fact that petitioner's counsel, although he had previously voiced a general objection to the giving of any *Allen* charge, did not object to the language of the charge as given. There is nothing in the record to support the claim that counsel could not have objected in time for the judge to modify his instruction if he considered that advisable. The record does show that, immediately following the jury's retirement, counsel and the court participated in a colloquy in which no mention of the wording of the charge was made. (R. 300.)

One purpose of Rule 30 is to have counsel point out his objection in a form specific enough to enable the court to correct its error. See *Butler* v. *United States,* 188 F. 2d 24 (C.A.D.C.); *Billeci* v. *United States,* 184 F. 2d 394 (C.A.D.C.). This requirement is not met by an objection made to the charge as a whole before it is delivered. *Ziegler* v. *United States,* 174 F. 2d 439 (C.A. 9). The instant case is an apt illustration of the propriety of this rule for it is evident that the court had no intention of

coercing the jury and that, if the implications which are now sought to be read into the sentence had been called to its attention, any possible misunderstanding could have been cleared up at the time.

Petitioner contends further that the trial judge abused his discretion by giving the *Allen* charge after the jury had deliberated for only three and a half hours. In *Allis* v. *United States,* 155 U.S. 117, 123, however, this Court held that the time at which a jury should be recalled for the purpose of assisting it to resolve difficulties "must be left to the sound discretion of the trial court." It is certainly proper to give the *Allen* charge when the jury reports it is "hopelessly deadlocked." Convictions have been upheld where an *Allen*-type charge was given after the jury had deliberated a little over two hours, *United States* v. *Olweiss,* 138 F. 2d 798 (C.A. 2), and less than an hour and a half, *Haskins* v. *United States,* 163 F. 2d 766 (C.A.D.C.).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 685

THOMAS EDWARD FURLONG, HARRY SCOTT KNEEVERS, and CHARLES JOSEPH SWARTZ,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY BRIEF.

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May 1, 1952 A.D.

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PETITIONERS' REPLY BRIEF.

Although Petitioners rely upon the matters set forth in support of the original Petition for Certiorari filed in this cause, they deem it advisable, to aid this Court in its understanding of the matters involved herein, to call attention to certain omissions of fact and misconceptions in Respondent's Brief in Opposition.

ARGUMENT.

I.

Respondent misconstrues the effect of the supplemental instruction in this case.

Respondent asserts that the supplemental charge was fair to the petitioners (Resp. Br. 9). The fallacy of the analysis which Respondent makes of the charge is that it ignores the fact that the test of this type of instruction is a balancing of the pressure on the jury to arrive at a verdict against the counter-pressure on each juror not to surrender his individual beliefs (*Stewart* v. *United States,* 300 Fed. 769, 785-787).

In this case, the only reference to the fact that a juror must see that the verdict is his own and not the result of a mere acquiescence in the views of the majority is contained in the beginning of the instruction, and it is immediately followed by a statement, qualifying in grammatical structure, with respect to the weight to be given to the views of the majority. The addition of the ending directing the jury to continue deliberating until it arrived at a verdict weakens the effect of this language since it is the last thing the juror hears before he returns to the jury room. Thus the general impression which the juror carries away is that it is necessary to arrive at a unanimous verdict, even if it does involve a deference to the views of the majority. Nothing is added to the charge in *Commonwealth* v. *Tuey,* 8 Cush. (Mass) 1 to give additional reinforcement to the duty of the individual juror to retain his honest convictions and express them in the verdict in order to counterbalance the effect of the last sentence of the charge in this case.

In the light of the foregoing, it is interesting to note that the court noted in *Bord* v. *United States,* 133 F. (2d) 313, 315, cited by Respondent, that the instruction closed with an instruction not to surrender their honest convictions and a cordial expression of appreciation to the jury rather than a threat that they would be held in the jury room until they agreed.

In contending that the language in the *Bord* case and in *United States* v. *Olweiss,* 135 F. (2d) 798 goes considerably beyond the language complained of here, (Resp. Br. 10), Respondent ignores the fact that, although those cases contained strong statements with respect to the ability of the jury to agree, they did not contain a threat to keep the jurors locked in the jury room until they did agree.

II.

Respondent misconceives the effect of the proceedings on the afternoon the charge was given and fails to take account of the expression of the trial judge on motion for new trial.

In attempting to show that the language was not considered coercive at the time the charge was given by citing the conduct of petitioners' counsel, Respondent ignores the fact that the jury was permitted to retire before counsel had an opportunity to object. (R. 300). At this point, the damage was done (*Byas* v. *United States,* 182 F. (2d) 94, 98). After a short colloquy, consisting of five lines in the printed record (R. 300) the court adjourned. Where counsel is not afforded the full opportunity to be heard out of the presence of the jury before it retires from the box without having to request it affirmatively, events transpire so quickly that it is an extremely unlikely assumption that counsel fully appre-

ciated the significance to be attached to those words when discussed at length in the jury room in the space of the minute or so before the judge left the bench. Even had counsel done so, it would have been too late under the rule in the *Byas* case.

Moreover, in intimating that had the trial judge been apprised of this contention he would have cleared up any misunderstanding (Resp. Br. 11), Respondent ignores the comments of the trial judge himself, on motion for new trial, where Judge Campbell says concerning this point (R. 337)

> "* * * and I had the charge in the *Allen* case in writing. We have it in the envelope in all cases anyway, and opportunity was given, as I recall, to object.
> Mr. McAdams: I objected, yes.
> The Court: You were given an opportunity to object to it, and your objection was overruled and the charge was then given to the jury,"

The judge then denied the motion for a new trial, made on this ground, and held the charge was non prejudicial.

CONCLUSION.

For the above and foregoing reasons, in addition to those submitted in support of the Petition for Certiorari herein, said petition should be granted.

Respectfully submitted,

FRANK J. MCADAMS, JR.,
Counsel for Petitioners.

May 1, 1952 A.D.

SUPREME COURT OF THE UNITED STATES

No. 707.—October Term, 1951.

W. L. Gelling, Appellant, v. State of Texas.	On Appeal From the Court of Criminal Appeals of the State of Texas.

[June 9, 1952.]

Mr. Justice Douglas, concurring.

The appellant was convicted under an ordinance of the city of Marshall, Texas, for exhibiting a picture after being denied permission to do so by the local Board of Censors. The conviction was affirmed by the Court of Criminal Appeals of Texas. The ordinance authorizes a local Board of Censors to deny permission for the showing of a motion picture, which in the opinion of the Board is "of such character as to be prejudicial to the best interests of the people of said City," and it makes the showing of a picture after refusal of permission a misdemeanor.

The evil of prior restraint, condemned by *Near* v. *Minnesota*, 283 U. S. 697, in the case of newspapers and by *Burstyn* v. *Wilson*, 343 U. S. ——, in the case of motion pictures, is present here in flagrant form. If a board of censors can tell the American people what it is in their best interests to see or to read or to hear (cf. *Public Utilities Comm'n* v. *Pollak*, 343 U. S. ——), then thought is regimented, authority substituted for liberty, and the great purpose of the First Amendment to keep uncontrolled the freedom of expression defeated.